



*[We redact certain identifying information and certain potentially privileged, confidential, or proprietary information associated with the individual or entity, unless otherwise approved by the requestor.]*

**Issued: March 17, 2011**

**Posted: March 24, 2011**

[Name and address redacted]

**Re: OIG Advisory Opinion No. 11-02**

Dear [name redacted]:

We are writing in response to your request for an advisory opinion regarding a complimentary local transportation arrangement whereby a hospital would transport patients from physician offices located on, or contiguous to, the hospital's campus to the hospital if the patients require further treatment and cannot transport themselves (the "Proposed Arrangement"). Specifically, you have inquired whether the Proposed Arrangement would constitute grounds for the imposition of sanctions under the civil monetary penalty provision prohibiting inducements to beneficiaries, section 1128A(a)(5) of the Social Security Act (the "Act"), or under the exclusion authority at section 1128(b)(7) of the Act, or the civil monetary penalty provision at section 1128A(a)(7) of the Act, as those sections relate to the commission of acts described in section 1128B(b) of the Act, the Federal anti-kickback statute.

You have certified that all of the information provided in your request, including all supplemental submissions, is true and correct and constitutes a complete description of the relevant facts and agreements among the parties.

In issuing this opinion, we have relied solely on the facts and information presented to us. We have not undertaken an independent investigation of such information. This opinion is limited to the facts presented. If material facts have not been disclosed or have been misrepresented, this opinion is without force and effect.

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that: (i) the Proposed Arrangement would not constitute grounds for the imposition of civil monetary penalties under section 1128A(a)(5) of the Act; and (ii) while the Proposed Arrangement could potentially generate prohibited remuneration under the anti-kickback statute, if the requisite intent to induce or reward referrals of Federal health care program business were present, the Office of Inspector General (“OIG”) would not impose administrative sanctions on [name redacted] under sections 1128(b)(7) or 1128A(a)(7) of the Act (as those sections relate to the commission of acts described in section 1128B(b) of the Act) in connection with the Proposed Arrangement.

This opinion may not be relied on by any persons other than [name redacted], the requestor of this opinion, and is further qualified as set out in Part IV below and in 42 C.F.R. Part 1008.

## **I. FACTUAL BACKGROUND**

[Name redacted] (the “Requestor”) is a [state redacted] non-profit, tax-exempt corporation that operates an acute care hospital and provides outpatient services. Under the Proposed Arrangement, the Requestor desires to provide complimentary local transportation to patients (and their families) that present at physician offices located on, or contiguous to, the Requestor’s campus; require further evaluation and treatment, including admission to the Requestor’s acute care facility,<sup>1</sup> and are unable to transport themselves.

The Requestor would pick up patients in a hospital-owned, wheelchair-accessible van containing basic safety equipment.<sup>2</sup> A trained, licensed EMT employed by the Requestor would operate the vehicle.

The Requestor would pick up patients from physician offices located on, or contiguous to, the Requestor’s campus and transport them to the main entrance of the Requestor’s hospital.<sup>3</sup> The Requestor certified that the usual distance a patient would be transported

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<sup>1</sup> The Requestor anticipates that not all patients would be admitted to its acute care facility. Patients may also be treated at an outpatient facility owned by the Requestor if medically appropriate. The Requestor certified that it would transport patients only to Requestor-owned outpatient facilities on the Requestor’s campus.

<sup>2</sup> The van would not be equipped or operated as an ambulance.

<sup>3</sup> Patients transported under the Proposed Arrangement may ask the Requestor to transport them back to their cars following discharge. The Requestor certified that it

would be approximately one-fourth of a mile. According to the Requestor, the transportation is necessary because its 108-acre campus has limited parking in close proximity to its hospital, and campus walkways may be difficult for feeble, elderly patients to navigate. The Requestor certified that there are limited alternative public transportation options available to patients, and that a van service operated by the Requestor would be able to respond more quickly to transport patients than any public transportation option.

Currently, 37 physicians or physician group practices maintain offices on the Requestor's campus, and 4 physicians or physician group practices maintain offices contiguous to the Requestor's campus (the "Physicians"). All Physicians are on the Requestor's medical staff.

If a Physician determines that a patient who needs immediate treatment at one of Requestor's facilities is unable to walk the distance required and has no available appropriate private transportation options, then the Physician's office may contact the Requestor to pick up and transport the patient to one of the Requestor's facilities. The EMT driver would respond and evaluate whether the patient could be transported safely in the van, or whether the patient would require an ambulance.

The Proposed Arrangement would be offered uniformly to all patients of Physicians regardless of a patient's income level, a patient's source of payment for Requestor's services, or the level of care provided to the patient.<sup>4</sup> The Requestor would not charge the passengers or any third party payor for the transportation. It would not claim the costs of the transportation directly or indirectly on any Federal health care program cost report or claim or otherwise shift the costs of the Proposed Arrangement to any Federal health care program. The aggregate value of the transportation services for each patient could exceed \$10 for one trip or \$50 on an annual basis.

The Requestor would not market or advertise the Proposed Arrangement; however, the Requestor would inform the Physicians of the availability of its complimentary local transportation program.

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would provide return transportation only to the patients' cars, located on the Requestor's campus, and would not transport patients to their homes or other locations.

<sup>4</sup> The Requestor anticipates that it would transport approximately 100 patients and their families per year. It estimates that approximately 68% of the transported patients would be Federal health care program beneficiaries.

Finally, the Requestor certified that it would operate the Proposed Arrangement in accordance with a written policy setting forth the operational requirements of the Proposed Arrangement.

## II. LEGAL ANALYSIS

### A. Law

The anti-kickback statute makes it a criminal offense knowingly and willfully to offer, pay, solicit, or receive any remuneration to induce or reward referrals of items or services reimbursable by a Federal health care program. See section 1128B(b) of the Act. Where remuneration is paid purposefully to induce or reward referrals of items or services payable by a Federal health care program, the anti-kickback statute is violated. By its terms, the statute ascribes criminal liability to parties on both sides of an impermissible “kickback” transaction. For purposes of the anti-kickback statute, “remuneration” includes the transfer of anything of value, directly or indirectly, overtly or covertly, in cash or in kind.

The statute has been interpreted to cover any arrangement where one purpose of the remuneration was to obtain money for the referral of services or to induce further referrals. United States v. Kats, 871 F.2d 105 (9th Cir. 1989); United States v. Greber, 760 F.2d 68 (3d Cir. 1985), cert. denied, 474 U.S. 988 (1985). Violation of the statute constitutes a felony punishable by a maximum fine of \$25,000, imprisonment up to five years, or both. Conviction will also lead to automatic exclusion from Federal health care programs, including Medicare and Medicaid. Where a party commits an act described in section 1128B(b) of the Act, the OIG may initiate administrative proceedings to impose civil monetary penalties on such party under section 1128A(a)(7) of the Act. The OIG may also initiate administrative proceedings to exclude such party from the Federal health care programs under section 1128(b)(7) of the Act.

Section 1128A(a)(5) of the Act (the “CMP”) provides for the imposition of civil monetary penalties against any person who gives something of value to a Medicare or state health care program (including Medicaid) beneficiary that the benefactor knows or should know is likely to influence the beneficiary’s selection of a particular provider, practitioner, or supplier of any item or service for which payment may be made, in whole or in part, by Medicare or a state health care program (including Medicaid). The OIG may also initiate administrative proceedings to exclude such party from the Federal health care programs. Section 1128A(i)(6) of the Act defines “remuneration” for purposes of section 1128A(a)(5) as including “transfers of items or services for free or for other than fair market value.” The OIG has previously taken the position that “incentives that are only nominal in value are not prohibited by the statute,” and has

interpreted “nominal value to be no more than \$10 per item, or \$50 in the aggregate on an annual basis.” 65 Fed. Reg. 24400, 24410–24411 (April 26, 2000) (preamble to the final rule on the CMP).

## **B. Analysis**

The Proposed Arrangement potentially implicates the anti-kickback statute and the CMP, prohibiting inducements to Medicare and state health care program beneficiaries, including Medicaid, because the transportation could be offered to induce Federal health care program beneficiaries to obtain Federally-payable items or services from the Requestor. The value of the transportation could exceed \$10 per transport or \$50 on an annual basis, and therefore could be of more than nominal value. However, for a combination of the following reasons, we would not subject the Requestor to administrative sanctions under the CMP or the anti-kickback statute in connection with the Proposed Arrangement.

First, the Proposed Arrangement would not selectively limit eligibility to targeted populations of Federal health care program beneficiaries. Patient eligibility would be uniformly determined by the Physicians in accordance with the Requestor’s written policy setting forth the operational requirements for the Proposed Arrangement.

Second, the type of transportation under the Proposed Arrangement would be reasonable. Transportation offered would not include expensive transportation such as limousines. The service would be provided by a van owned by the Requestor and driven by a certified EMT employed by the Requestor.

Third, the Proposed Arrangement would only be offered locally from the Physicians’ offices located on or contiguous to the Requestor’s 108-acre campus. Patients would be transported only approximately one-fourth of a mile.

Fourth, the Requestor would not advertise the Proposed Arrangement.

Fifth, the Requestor certified that the availability of local public transportation and parking is limited.

Finally, the cost of the transportation would neither be claimed, directly or indirectly, on any Federal health care program cost report or claim, nor otherwise be shifted to any Federal health care program.

Therefore, for a combination of all of these reasons, we would not subject the Requestor to sanctions for the Proposed Arrangement in connection with the CMP. Additionally,

we would not subject the Requestor to sanctions in connection with the anti-kickback statute for the Proposed Arrangement.

### **III. CONCLUSION**

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that: (i) the Proposed Arrangement would not constitute grounds for the imposition of civil monetary penalties under section 1128A(a)(5) of the Act; and (ii) while the Proposed Arrangement could potentially generate prohibited remuneration under the anti-kickback statute if the requisite intent to induce or reward referrals of Federal health care program business were present, the OIG would not impose administrative sanctions on [name redacted] under sections 1128(b)(7) or 1128A(a)(7) of the Act (as those sections relate to the commission of acts described in section 1128B(b) of the Act) in connection with the Proposed Arrangement. This opinion is limited to the Proposed Arrangement and, therefore, we express no opinion about any ancillary agreements or arrangements disclosed or referenced in your request for an advisory opinion or supplemental submissions.

### **IV. LIMITATIONS**

The limitations applicable to this opinion include the following:

- This advisory opinion is issued only to [name redacted], the requestor of this opinion. This advisory opinion has no application to, and cannot be relied upon by, any other individual or entity.
- This advisory opinion may not be introduced into evidence in any matter involving an entity or individual that is not a requestor of this opinion.
- This advisory opinion is applicable only to the statutory provisions specifically noted above. No opinion is expressed or implied herein with respect to the application of any other Federal, state, or local statute, rule, regulation, ordinance, or other law that may be applicable to the Proposed Arrangement, including, without limitation, the physician self-referral law, section 1877 of the Act.
- This advisory opinion will not bind or obligate any agency other than the U.S. Department of Health and Human Services.
- This advisory opinion is limited in scope to the specific arrangement described in this letter and has no applicability to other arrangements, even those which appear similar in nature or scope.

- No opinion is expressed herein regarding the liability of any party under the False Claims Act or other legal authorities for any improper billing, claims submission, cost reporting, or related conduct.

This opinion is also subject to any additional limitations set forth at 42 C.F.R. Part 1008. The OIG will not proceed against [name redacted] with respect to any action that is part of the Proposed Arrangement taken in good faith reliance upon this advisory opinion, as long as all of the material facts have been fully, completely, and accurately presented, and the Proposed Arrangement in practice comports with the information provided. The OIG reserves the right to reconsider the questions and issues raised in this advisory opinion and, where the public interest requires, to rescind, modify, or terminate this opinion. In the event that this advisory opinion is modified or terminated, the OIG will not proceed against [name redacted] with respect to any action taken in good faith reliance upon this advisory opinion, where all of the relevant facts were fully, completely, and accurately presented and where such action was promptly discontinued upon notification of the modification or termination of this advisory opinion. An advisory opinion may be rescinded only if the relevant and material facts have not been fully, completely, and accurately disclosed to the OIG.

Sincerely,

/Lewis Morris/

Lewis Morris  
Chief Counsel to the Inspector General